Supreme Court of the United States

OCTOBER TERM, 1942.

No. 853.

NELLIE C. BOSTWICK ET AL., PETITIONERS,

VS.

BALDWIN DRAINAGE DISTRICT ET AL.,
RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

OPINION BELOW.

The opinion of the Court of Appeals filed January 22nd, 1943, appears in the transcript of record presented with this petition and brief, at pages 381 to 390. That said opinion has been or will be reported in 133 F. 2d 1.

2.

JURISDICTION.

A statement particularly disclosing the basis upon which it is contended that this Court had jurisdiction has been previously set out in the accompanying petition for writ of certiorari and need not be here repeated.

3.

STATEMENT OF THE MATTERS INVOLVED.

The foregoing petition for writ of certiorari, beginning on page 2 thereof, presents a "summary statement of matters involved" consisting for the most part in an analysis of the answer of petitioners filed in the district court. That statement pointed out that said answer was attacked by motion to strike and motion for injunction filed by the Drainage District. That the district court by an order and decree of July 16th, 1942, treated the motion for injunction as a motion for judgment on the pleadings and thereupon proceeded to give what amounted to a declaratory judgment of title in favor of the Drainage District. To avoid repetition that statement of the matters involved is re-submitted as a part of this brief.

4.

ASSIGNMENTS OF ERROR.

The adverse rulings of the Court of Appeals and the failures of that court to rule upon important questions have been shown by questions A to J stated in the foregoing petition for writ of certiorari followed by statements of what the court did or did not do with respect to said questions. We have in each instance indicated how and why we think the Court of Appeals was in error. To avoid further repetition we shall not undertake at this point to restate a complete assignment of errors and respectfully refer the Court to said questions A to J inclusive for a statement of the matters of which we complain. In the following argument we have restated as points what we regard as the chief errors committed by the Court of Appeals which warrant further comment supplementing the argument already included in the foregoing petition for writ of certiorari.

5.

ARGUMENT.

POINT I.

The court of appeals erred in holding that the recital or decision in favor of jurisdiction contained in the order appointing a receiver in the original case of Louis Kreitmeyer v. Baldwin Drainage District was res judicata as to landowners, because the Drainage District was then the sole defendant and no landowner had yet been sued.

This point is sustained by the following decisions of this court:

O'Brien v. *Wheelock*, 184 U. S. 450, 481, 483, 46 L. Ed. 636, 651, 652.

Ocean Beach Heights v. *Brown-Crummer Investment Co.*, 302 U. S. 614, 616-618, 82 L. Ed. 478, 480-481.

Kersh Lake Drainage Dist. v. *Johnson*, 309 U. S. 481, 494, 84 L. Ed. 881, 887.

U. S. v. *Pink*, 315 U. S. 203, 216, 6 L. Ed. 796, 810.

Stoll v. *Gottlieb*, 305 U. S. 165, 83 L. Ed. 104, does not apply here because Gottlieb who made the attack in a state court had previously filed a petition in the former federal court re-organization case, attacking federal jurisdiction and had gotten an adverse decision on that very point as a "contested issue." Here, no landowner was even a party to the Kreitmeyer suit when the receiver was appointed. Moreover, the answer of the Drainage District, quoted R. 169, *et seq.*, raised no question of federal jurisdiction but only that the amendment to the state statute providing for a receiver was void on account of bad title being contrary to Section 16, Article III, of the State Constitution.

Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U. S. 371, does not apply. First, because the com-

plaining bank had accepted the benefits of the re-organization order under attack. Since the bank was not injured it was not such a party as could make the attack. *Heald v. District of Columbia,* 259 U. S. 114, 123. Second, the court on account of the particular facts involved, refused to permit the act to have "retroactive invalidity." That being the case the act under attack remained valid as to the attacking bank and the court's jurisdiction was consequently not impaired. Third, the attacking bank was before the court in the former re-organization proceedings as also in the subsequent case. Here the landowners were not present and no landowner had yet been sued.

If the Court of Appeals' decision as to what constitutes *res judicata* when applied to the original Kreitmeyer case is wrong, then, unless corrected, the evil thereof will be widespread throughout the States under the jurisdiction of that court. Already the Honorable Alexander Akerman, District Judge at Orlando, Florida, has announced that he regards himself bound by the *res judicata* doctrine as thus applied by the Court of Appeals and has announced that he will follow the same in another important case, but upon being advised that this petition is being presented he has further announced that he expects to withhold his decree until it is known whether the decision of the Court of Appeals in this case will be changed.

POINT II.

The court of appeals erred in giving no heed to the interests and attitudes of the Drainage District as set forth in its answer filed in the Kreitmeyer case and quoted R. 168 to 175 and in giving no heed to the disclaimers of Kreitmeyer and Brown contained in their petitions filed after they got the order appointing a receiver (quoted R. 177 to 184) **and in giving no heed to the language of the tax foreclosure decrees quoted R. 187 to 191, all showing by the face**

of the former records that no substantial controversy—no "Collusion of interests"—remained between the bondholders and the district and that the district was in effect on the same side with the bondholders in enforcing a district cause of action against alleged delinquent property owners.

The following decisions show that if any federal jurisdiction ever existed in these tax foreclosure proceedings it disappeared long before any masters' deeds were issued to the Drainage District. *Blacklock* v. *Small*, 127 U. S. 96. *Boston & M., etc., Mining Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, 643. *Hamer* v. *N. Y. Railways Co*, 244 U. S. 266, 274. *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69, and cases cited in footnotes 1, 2 and 4. In the *Blacklock case* and the *Hamer case, supra*, answers filed by a defendant showed that the interests of such answering defendant were on the same side as the plaintiff and that destroyed the *prima facie* showing of jurisdiction which had appeared by the bill. In the Boston & M., etc., Mining Co. case an answer was filed containing disclaimers of any controversy with the plaintiff on a substantial point and that too destroyed federal jurisdiction. The Indianapolis case and cases therein cited and in the foot notes reiterated and emphasized the necessity of a strict application of the acts of Congress restricting federal jurisdiction when it depended upon diversity of citizenship and that case reviewed most of the prior decisions pointing out the duty of the court, particularly under the Act of 1875, now Title 28, U. S. C. A., Sec. 80, to examine the pleadings and all parts of the record in a case to ascertain the interests and attitudes of the parties and to consider them as aligned on opposite sides according to their respective interests and attitudes so disclosed and if when that is done it appears that citizens of the same state are on opposite sides no federal jurisdiction exists. That is exactly what appeared by the face of the records made in the former federal tax foreclosure proceedings.

Additional matters of record set forth in Section XIV of petitioners' answer (R. 165 *et seq.*) additionally showed the mandatory duty of the court to have dismissed the tax proceedings. The failure of the court to act on its own motion or the failure of the defendants to invoke the law above cited did not make valid orders and decrees of the court otherwise void. 1 Freeman on Judgments (5th Edition), Section 322.

POINT III.

The court of appeals erred in disregarding the further point that under the state statute invoked by the bondholder Kreitmeyer he was required to prosecute and did prosecute a drainage district cause of action. The court also erred in failing to attach any significance to the fact that the records made in the tax foreclosure proceedings showed that the specific "object sought" by the complaining bondholders was to use the receiver process and remedy provided for by what is now Section 1493, Compiled General Laws of Florida, rather than other available remedies equally efficacious under what is now Section 1473, Compiled General Laws, and that the difference in value of said remedies to the complaining bondholders was unsubstantial and insufficient to sustain federal jurisdiction.

To make this point clear it is necessary to quote material parts of the statutes cited. Section 1473, Compiled General Laws of Florida, being Section 23 of the original drainage law, Chapter 6458, Laws of Florida, 1913, as amended by Acts of 1921 and 1923, provided in part as follows:

> "The board (meaning the Board of Supervisors) shall within twelve months after April 1st of each year institute a suit in chancery in the corporate name of the district against the land or lands upon which such drainage tax has not been paid in the county in which the property is situated * * * In case said district shall fail to commence suit within

> ninety days after the taxes have become delinquent, the holder of any bond or bonds or note or notes issued by the district shall have the right to bring suit for the collections of the delinquent taxes, in which event said district shall be included as a defendant, and the proceedings in such suit brought by any note or bondholder shall in all respects be governed by the provisions applicable to suits by the said district. * * * The proceeds of sale made under and by virtue of this Article shall be paid at once to the aforesaid treasurer and shall be accounted for by him the same as the drainage taxes."

Under this section a complaining bondholder could have brought a mandamus against the Supervisors to sue the alleged delinquents such as Duval Cattle Company, but as shown by the answer of the District filed in the Kreitmeyer receivership case, such mandamus was not necessary because the District (as appears R. 173) actually filed a suit against Duval Cattle Company on April 15th, 1924, which was thirteen days before the receiver was appointed. Under the section above quoted the bondholder could have sued the alleged delinquents in his own name, joining the Drainage District as a defendant, but any recovery in any such suit would have gone into the treasury of the District to be paid out pro rata on all valid delinquent coupons. In other words, the cause of action if so prosecuted by a bondholder would have been a district cause of action and the District necessarily would have been aligned with the plaintiff bondholder in interest even though named a defendant. In such a case a federal court would have had no jurisdiction. The Fifth Circuit Court of Appeals rightly so held in construing a similar Texas statute involved in the case of *City and County of Dallas Levee Improvement District* v. *Industrial P. Corp.*, 89 F. 2d 731 (5 C. C. A.). This Court held to like effect in *Hamer* v. *N. Y. Railways Co.*, 244 U. S. 266, 274. Other lower court cases to the same effect are cited with approval in foot note 1 to the case of *Indianapolis* v. *Chase National Bank, supra.*

Section 1493, Compiled General Laws of Florida, which was Section 41 of the original drainage act, Chapter 6458, Laws of Florida, 1913, and amended by Act of 1923, provided in part as follows:

> "If any bond or interest coupon on any bond issued by said district is not paid within sixty days after its maturity, a court of competent jurisdiction, on the application of any holder of such bond or interest coupon so overdue, may appoint a receiver for the district * * * the proceeds of taxes collected by the receiver shall be applied after payment of costs, first to overdue interest, and then to payment pro rata of all bonds issued by the said district which are then due and payable; and the said receiver may be directed to foreclose, by suit as hereinbefore provided, the lien of said taxes on said lands, and said suits, so brought by the receiver, shall be conducted as and governed by the provisions applicable to suits by the said district as hereinbefore provided, and with like effect."

It was under this statute that the bondholder Kreitmeyer and the intervener bondholder Brown undertook to proceed, but, as seen by the language of the statute, the prosecution of any such case was for the benefit of the District as a district cause of action. This is so because any moneys collected went into the treasury of the District to be paid out pro rata on all valid outstanding obligations.

What is now Section 1474, Compiled General Laws, which was Section 24 of the original Drainage Act of 1913 and amended by Act of 1923, is also pertinent in this connection and reads in part as follows:

> "All suits instituted under the preceding sections shall stand for trial as other equitable actions * * * in any case where the lands are offered for sale by the master, and the sum of the tax due, together with interest, costs and penalty, is not bid for the same, it shall be the duty of said board to bid the whole amount due thereon as aforesaid in the name of the district and the master shall sell same to such district, and such lands so bid in the name of the district shall,

> if subsequently confirmed in accordance with the above provision, become the property of the district in fee simple."

The provisions of this section were operative in connection with the portion above quoted from Section 1493, and this is demonstrated by the form of the final decrees entered in the Hemphill tax suits as quoted R. 187 to 191. The statute contemplated and those decrees contemplated that no private bidder would perhaps bid the amount of the taxes, costs, attorney's fees and other charges. Hence the statute provided and the decrees provided that any recovery obtained by the receiver would be regarded as belonging to the District and as entitling the District to credit therefor upon its bids for the property when put up for sale by the special master. It is plain therefore that the ultimate result that might be obtained through the instrumentality of the receiver and the benefit to a complaining bondholder was substantially the same as if he had proceeded under Section 1473 above quoted. The attorneys acting for the complaining bondholders knew this before they started. When they filed the disclaimer petition of Kreitmeyer or rather when he filed it in his own proper person (R. 177 to 182) there was nothing left in his case except his insistence that he have the services of a receiver to aid him in the enforcement of a district cause of action. In the case of *Johnson* v. *Riverland Levee Dist.*, 117 F. 2d 711, the Eighth Circuit Court of Appeals had under consideration the Missouri Levee Statute which is much the same as the Florida Statute, and the court distinctly held that a federal court had no jurisdiction or power to act as such tax collecting agency, but irrespective of whether that holding be controlling here the fact remains that the value of the remedial right insisted upon by Kreitmeyer was unsubstantial over and above rights he could have exercised under Section 1473, Compiled General Laws, above quoted. The value of his bonds or coupons was no longer in actual controversy but

only his insistence to use the receivership remedy and have his own counsel appointed to represent the receiver. Since such facts clearly appeared upon the face of the record the court had no jurisdiction. *Healy* v. *Ratta*, 292 U. S. 263, 208, 270. *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 181, 184. *Thomson* v. *Gaskill*, 315 U. S. 442, 446, 447.

The district court correctly held (R. 277) that he would take judicial notice of the records made in the former tax foreclosure proceedings. Those records including the parts pleaded in the petitioners' answer showed that the receivership remedy selected and insisted upon by Kreitmeyer was not efficacious. At bottom R. 185 it is alleged that the receivership continued for about ten years until March, 1934, but at no time was any accounting ever taken on the amount of bonds or coupons owned by Kreitmeyer or Brown and no judgment was ever entered on such accounting in favor of either. Again it is alleged (bottom R. 215) that the receiver was discharged in March, 1934, and all undisposed of tax foreclosure suits were dismissed. Also (R. 216) it is alleged that the present majority bondholders, J. W. Harrell and W. R. Schnauss, claimed to own bonds of the District, that is to say $520,000 par value out of a total of $560,000. These were the bonds formerly owned by Kreitmeyer and his associates and Warren E. Brown and his associates. Not a dollar of principal was ever paid on any bonds issued by the District. As a result of the real estate boom of 1925 the receiver made considerable collections but as alleged (R. 216) most of his collections were eaten up with attorneys' fees, receiver's fees and other court expenses. The remainder was applied towards interest on some of the bonds. The record therefore shows that the object of the receivership was a substantial failure though it lasted for a period of ten years. Duval Cattle Company lands were purportedly sold to the District by a special master and the same occurred with respect to Jackson-

ville Heights Improvement lands, but no money was realized from such sales and eventually the court concluded to dismiss the fruitless proceedings not yet concluded. Therefore the record demonstrates that the receivership remedy was no more efficacious than would have been the remedies provided by Section 1473, Compiled General Laws, above quoted.

POINT IV.

The court of appeals erred in holding that the court in Hemphill v. Jacksonville Heights Improvement Co., on a bill to collect "instalment taxes" levied under what is now Section 1468, Compiled General Laws, had jurisdiction to enter a decree, contrary to the court's findings, and without the court's knowledge, for amounts which included for more than a one-sixth part void pretended maintenance taxes levied under what is now Section 1496, Compiled General Laws.

This point is fully sustained by the record made in that suit. The bill is quoted R. 282 to 305 and is plainly confined to "annual instalment taxes." The same is true by the exhibits attached thereto. The findings of facts and conclusions by the court (R. 309 to 315) recite in several places that the findings appertain to "annual instalment taxes" only and yet it appeared by a part of the evidence filed, which apparently escaped the attention of the court, namely, the drainage tax books, sample page of which is shown R. 307, that annual maintenance taxes for three years were included in the amounts set up in the exhibits to the bill and were included in the amounts awarded by the decree, sample page of which as to descriptions and amounts appears R. 316. Thus the record clearly demonstrated that the decree by mistake of the receiver and the attorneys and the tax collector and by mistake of the court included an entirely different subject matter not sued for, to-wit, maintenance taxes, the invalidity of which is clearly demonstrated by the show-

ing contained in Section X of petitioners' answer (R. 134 to 141). In such circumstances the decree was clearly bad for want of jurisdiction and the attack thereon should have been sustained under the decisions of this court in *Gage* v. *Pumpelly,* 115 U. S. 454. *Reynolds* v. *Stockton,* 140 U. S. 254.

POINT V.

The court of appeals erred in holding that the decree in the case of Hemphill v. Duval Cattle Company et al., reported 41 F. 2d 433, was res judicata as to Mrs. Bostwick.

The mortgage trustees were *defendants,* not plaintiffs, in that suit. This eliminates the general rule ordinarily applied where such trustees are plaintiffs and sue to enforce the mortgage trust. Moreover that suit did not involve foreclosure of a railroad mortgage where bondholders are very numerous and widely scattered.

The rule of property in Florida applicable here is stated in Florida Equity Rule 29 and in *Griley* v. *Marion Mtg. Co.,* 132 Fla. 299. The Griley case cited and followed *Carey* v. *Brown,* 92 U. S. 171, and the Carey case in turn cited and followed the Virginia case of *Collins* v. *Lofftus,* 10 Leigh 5, 34 Am. Dec. 719. Alabama cases are to like effect. *Lebeck* v. *Ft. Payne Bank,* 115 Ala. 447, 22 So. 75. Also Wiltsie on Foreclosure (3rd Edition), Section 167, and 3 Jones on Mortgages (8th Edition), Section 1784, page 242.

When Mrs. Bostwick got her master's deed in February, 1925, the Duval Cattle Company lost all title and the mortgage trustees no longer had any trust to perform. Another rule applicable here is stated in *Andrews* v. *National Foundry & Pipe Works,* (7 C. C. A.) 77 Fed. 774, 777, 36 L. R. A. 139, 154, to the effect that since Mrs. Bostwick was a mortgage bondholder beneficiary she was not a purchaser *pendente lite* and her title related back to the date of the mortgage which was July, 1919. The Court of Appeals in this case gave no heed to that rule.

POINT VI.

If the trustees did represent Mrs. Bostwick in the Hemphill tax suit then the court of appeals was still in error in not holding that she had the right in this proceeding in equity to attack as she has done the tax decree for fraud or mistake arising from the fact that the supervisors, the receiver and his counsel either by design or mistake concealed from the trustees valid defenses now described in Sections XVII-A and XI and XII of petitioners' answer.

This proposition is sustained by many authorities such as Pomeroy's Equity Jurisprudence (4th Edition), Volume 2, pages 1921 and 1922. Also Volume 3, Freeman on Judgments (5th Edition), pages 2520, 2523, 2571 and 2572.

POINT VII.

The court of appeals erred in not sustaining the attack made by Section XV of petitioners' answer, namely, that the federal tax decrees were predicated upon void state decrees, the invalidities of which were pointed out in Sections IV and VI of petitioners' answer.

The invalidity of such decrees is well shown by Missouri decisions and those Missouri decisions are very pertinent because the Florida Drainage Act of 1913 was largely copied from the Missouri Drainage Law of the same year. The invalidity of the original decree here involved is shown by *Inter-River Drainage Dist.* v. *Henson,* (Mo.) 99 S. W. 2d 865, 8th and 9th headnotes and supporting text. The second decree undertaking to confirm assessments of benefits was also void because the notice intended to bind property owners did not comply with the drainage statute.

It would create an anomalous situation if the state courts now considering these questions hold that either or both of those state decrees were void. In any such event all of the drainage taxes claimed against the thirty-eight parcels not involved in these appeals would go out

in toto, yet under the decision of the Court of Appeals the Drainage District and its bondholders would be permitted to maintain their title to these four parcels here involved though that title was predicated upon the same totally void taxes.

POINT VIII.

The court of appeals erred in not sustaining the contention of petitioners to the effect that the chain of facts and circumstances set out in Sections IV to XIII and XVII and XVII-A of their answer made it inequitable and unconscionable for the Drainage District and its present majority bondholders to maintain the claim of title acquired in such manner.

This proposition is we think sustained by many decisions of this Court such as *Brownsville* v. *Loague*, 129 U. S. 493. *Lawrence Mfg. Co.* v. *Janesville Cotton Mills*, 138 U. S. 552. *Marshall* v. *Holmes*, 141 U. S. 596. *Arrowsmith* v. *Gleason*, 129 U. S. 86, 101. *Simon* v. *Southern Ry.*, 236 U. S. 115. These authorities are particularly applicable here because the Drainage District by its answer in this cause (R. 61 to 73) opened the door and invited the court to look behind the decrees relied upon by the District and consider its claims as *tax lienor* against all of the forty-two parcels involved in this suit.

POINT IX.

The court of appeals erred in giving no heed to the jurisdictional attack on the former tax decrees made by Section XX of petitioners' answer (R. 222 *et seq.*) **to the effect that said decrees went beyond the jurisdiction of the court by imposing sundry unconstitutional conditions of sale and redemption.**

The attacks made in that section are, we think, sustained by such cases as *Clark* v. *Reyburn*, 8 Wall. 318. *Brine* v. *Hartford Fire Ins. Co.*, 96 U. S. 627. *Municipal*

Investors Assn. v. *City of Birmingham,* (Mich.) 299 N. W. 90, affirmed by this Court 316 U. S. 153.

We now respectfully submit that the matters aforesaid amply warrant the issuance of writ of certiorari and the petitioners humbly pray that the same may be issued.

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